SUPREME COURT, U. S.
Supreme Court
DEC 10

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-906

L. N. PATTERSON, O. E. BURNETT, R. D. EZELL, AND L. A. NELSON,
Petitioners,

VS.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
Respondent,

BERNARD C. VUN CANNON,
Real Party in Interest.

Petition for Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

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Petition for Writ of Certiorari to The United States Court of Appeals for the Ninth Circuit

Petitioners, L. N. Patterson, O. E. Burnett, R. D. Ezell and L. A. Nelson, petitioners in the Court of Appeals for the Ninth Circuit, respectfully petition that a Writ of Certiorari issue to the United States Court of Appeals for the Ninth Circuit to review the order of that Court entered on September 12, 1973, denying petitioners' petition for writ of mandamus which sought relief from an order of the Dis-

trict Court upholding a claim of privilege under the Fifth Amendment asserted by the plaintiff in a civil rights action.

OPINIONS BELOW

The Court of Appeals denied the petition for writ of mandamus without opinion. A copy of the order is appended hereto as Appendix A. The order of the United States District Court filed on May 4, 1973, is appended hereto as Appendix B.

JURISDICTION

On September 12, 1973, the United States Court of Appeals for the Ninth Circuit denied petitioners' petition for writ of mandate, without opinion, thus refusing to review the order of the District Court below and leaving in effect that Court's ruling that a plaintiff in a civil action may refuse to answer interrogatories concerning allegations of the complaint by asserting a Fifth Amendment claim of the privilege against self-incrimination. The jurisdiction of this Court is invoked under Title 28, United States Code, section 1254(1).

QUESTION PRESENTED

Whether a plaintiff in a civil rights action can refuse to answer interrogatories concerning the allegations of his complaint and basic to his cause of action by asserting the Fifth Amendment privilege against self-incrimination.

STATUTES INVOLVED

Federal Rules of Civil Procedure 26, 33 and 37.

STATEMENT OF THE CASE

Plaintiff Bernard C. Vun Cannon filed a Civil Rights suit alleging that defendants Patterson, Ezell, Burnett and

Nelson,[1] with knowledge that plaintiff's life had been threatened because he refused to carry out orders to kill another inmate, deliberately "set him up" to be attacked by an inmate in retaliation, that he was so attacked and was injured.[2]

On July 25, 1972, defendants filed and served interrogatories propounded to plaintiff Bernard C. Vun Cannon. Interrogatories 16a through 16d asked for factual information concerning the allegations on page 7 of the amended complaint that he had been ordered to stab a black inmate. In his answer to defendants' interrogatories filed on or about November 20, 1972, plaintiff refused to answer these interrogatories, giving as his reason:

> "I object to answering the questions contained in this interrogatory on the advice of my attorney. To require an answer to these questions would violate my privilege against self-incrimination, secured by the Fifth and Fourteenth Amendments to the United States Constitution and would place my life in immediate and grave danger of reprisals from other inmates."[3]

On December 20, 1972, defendants filed a motion to compel answers or in the alternative to dismiss the complaint and motion to strike allegations of the complaint. The matter was referred to the magistrate and on March 5, 1973, he filed his findings and recommendations. While the magistrate upheld the right to claim the privilege, he recommended that the motion to compel answers be granted on

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1. Allen F. Breed, Chairman of the Youth Authority Board, and Raymond K. Procunier, Director of Corrections were also named, but summary judgment was granted in their favor.

2. A copy of the amended complaint is appended hereto as Appendix C.

3. Plaintiff's Answer to the interrogatories is appended hereto as Appendix D.

grounds there was no valid basis for claiming the privilege. *See,* findings and recommendations at 2-4.[4]

On or about March 16, 1973, plaintiff filed a request for review of the magistrate's decision. On May 9, 1973, the District Court filed a memorandum and order affirming in part the Magistrate's findings. *See,* Appendix B. The court held that the plaintiff in a Civil Rights action could raise a Fifth Amendment claim. Therefore, plaintiff could not be required to answer interrogatories 16a-d.

On May 18, 1973, defendants filed an application for rehearing or modification, requesting the court to impose a meaningful sanction or to modify its order to permit an interlocutory appeal pursuant to 28 U.S.C. 1292(b) and Rule 5 of the Federal Rules of Civil Procedure. This application was denied at a hearing on July 6, 1973. On July 24, 1973, petitioners Patterson, Burnett, Ezell and Nelson filed a petition for Writ of Mandamus and/or Prohibition in the Ninth Circuit Court of Appeals urging that the District Court erroneously ruled that the plaintiff in a civil rights action could assert the privilege as a basis for refusing to answer interrogatories concerning allegations made in his complaint and basic to his claim. After requesting and receiving opposition from the plaintiff, the Real Party in Interest, the Court of Appeal denied the petition without opinion. *See* Appendix A.

REASONS FOR GRANTING THE WRIT

This case involves the important question of the extent to which a plaintiff can shield himself from discovery relating to allegations on which his cause of action is based. Federal Rules of Civil Procedure 26, 33, and 37 provide

4. The magistrate's order is appended hereto as Appendix E. Other matters decided by the magistrate and subsequently by the court on request for review are not at issue in this petition.

that the parties to a civil action have the right to submit interrogatories as to relevant matters and to obtain responses unless the matter is privileged. By filing a complaint and making factual allegations the plaintiff in a civil action must be deemed to have waived any privilege as to these allegations if he wishes to keep them at issue in the action. If he asserts a privilege, then the allegations should be stricken from the complaint and any proof concerning them barred. If, without the stricken allegations, the complaint then fails to state a cause of action the complaint must be dismissed. This was the result reached by the Ninth Circuit Court of Appeals in a prior case, *Lyons v. Johnson,* 415 F.2d 540 (9th Cir. 1969) *cert. denied* 397 U.S. 1027, and is the only result which protects the defendants in such an action from the unconscionable prejudice which results if a party is able to assert a claim and then block discovery by asserting a Fifth Amendment privilege as to the allegations made. Mandamus is the only remedy in such a case because defendants cannot properly prepare their case, will suffer irreparable injury and prejudice, have no remedy by immediate appeal, and review after a trial for which they are unable properly to prepare is clearly inadequate.

ARGUMENT

A Plaintiff by Filing a Civil Action Waives His Claim of Privilege Under the Fifth Amendment as to Allegations of the Complaint.

In his complaint, plaintiff Vun Cannon alleged that he was a white Nazi who was ordered to kill a black inmate, that his life had been threatened because he refused to do so, that defendants Patterson, Ezell, Burnett and Nelson knew of the threat and deliberately "set him up," for the impending attack, and that he was attacked and injured.

Thus, the threat and the circumstances surrounding it are basic to the cause of action. Defendants filed interrogatories seeking detailed information about the threat and its circumstances. *See* Appendix D, Interrogatories 16a through 16d. Plaintiff refused to answer, asserting his privilege against self-incrimination.

The District Court upheld the claim of privilege, and the Court of Appeals denied defendants' petition for relief, thus permitting the ruling of the District Court to stand. It is petitioners' position that the holding of the District Court was clearly erroneous, and that the Court of Appeals' refusal to correct it has created a situation in which defendants are faced with irreparable prejudice.

The basic question at issue is whether a *plaintiff* can make allegations in a complaint, necessary to his cause of action, and then assert a privilege to preclude discovery concerning them. We submit that to permit such a result completely subverts the purpose of the rules of discovery and converts a procedure designed to accomplish justice into one of inestimable prejudice to defendants.

This question was considered by the Ninth Circuit Court of Appeals in *Lyons v. Johnson,* 415 F.2d 540 (9th Cir. 1969), *cert. denied,* 397 U.S. 1027, and the Court established the basic principle that a plaintiff could not be permitted to obtain the shield of the privilege and still use the sword. In the circumstances, where the plaintiff refused to answer any questions, the Court of Appeal upheld the dismissal of the action by the District Court stating:

> "Her obtaining of this shield [Fifth Amendment] however, could not provide a sword to her for achieving assertion of her claims against the defendants without having to conform to the processes necessary to orderly and equal forensic functioning. Clearly the process of discovery has been increasingly recognized as one of

> the primary and essential elements in making federal court business flow and in contributing to the accomplishing of trial justice or settlement termination of litigation. The scales of justice would hardly remain equal in these respects, if a party can assert a claim against another and thus be able to block all discovery attempts against him by asserting a Fifth Amendment privilege to any interrogation whatsoever upon his claim. If any prejudice is to come from such a situation, it must, as a matter of basic fairness in the purposes and concepts on which the right of litigation rests, be to the party asserting the claim and not to the one who has been subjected to its assertion. It is the former who has made the election to create an imbalance in the pans of the scales." *Id.* at 542.

We also invite this Court's attention to *Brown v. Ames*, 346 F.Supp. 1176 (D. Minn. 1972), which followed the Court of Appeals decision in *Lyons* and dismissed the action where the privilege was asserted by the plaintiff in a less extreme situation than *Lyons*, and one analogous to the case at bar.

In *Brown*, the court held that plaintiffs who commenced an action under the Civil Rights Act, thus "submitting themselves to the jurisdiction of the court, can be compelled either to waive their Fifth Amendment privilege and respond to discovery proceedings and later of course to cross-examination at trial, or have their civil rights action dismissed with prejudice." *Id.* at 1177. The plaintiffs had refused to answer questions dealing with activities which were relevant as to probable cause to make the arrests at issue in the case, although the plaintiffs had been deposed at length on other questions.

In discussing *Lyons*, the court in *Brown* stated that *Lyons* could conceivably be distinguished because the plaintiff there refused to answer any questions, and in the case before it plaintiffs objected to only certain questions. This,

however, seemed to the court, "a rather tenuous basis for distinction." *Brown,* at 1177. The court noted the case, *Christenson v. Christenson,* 281 Minn. 507, 162 N.W. 2d 194 (1968), in which the court in a "well reasoned opinion" concluded that the Fifth Amendment may be used as a shield but not a sword. The court in *Brown* also analogized the situation to the "well settled rule that a defendant in a criminal case may choose not to testify, claiming his privilege, but once he voluntarily takes the witness stand, he cannot thereafter object and refuse answers on cross-examination or otherwise claim a privilege." *Id.* at 1178.

The court continued:

> "The case at bar is not of course one where a defendant in a civil action seeks to invoke the privilege. He may do so. See *Duffy v. Currier* [291 F.Supp. 810 (D. Minn. (1968).] Nor is the court here willing to hold that merely by bringing the action plaintiffs have irrevocably waived their privilege, but rules only that to continue to prosecute this action further, plaintiffs must do so; else their action will be dismissed. They have an election." *Ibid.*

The District Court, in making its ruling, dismissed as inapplicable the Ninth Circuit decision in *Lyons* because it involved an extreme factual situation. That the extreme factual situation in *Lyons* required dismissal does not change the principle involved: The plaintiff in a civil action has waived the privilege as to the claims made. If he persists in refusing to answer, then further action, under Rule 37 and appropriate to the case must be taken. In the instant case, the District Court *upheld* the claim of privilege, a result contrary to *Lyons* and to any principle of "orderly and equal forensic functioning."

The District Court erroneously interpreted the cases in which its decision was based: *McCarthy v. Arndstein,* 266

U.S. 34 (1924); *Societe Intrnationale v. Rogers,* 357 U.S. 197 (1958); *Spevack v. Klein,* 385 U.S. 511 (1967); *Malloy v. Hogan,* 378 U.S. 1 (1964).[5] Appendix B at 3. *McCarthy* holds only that the privilege against self-incrimination applies in civil actions. This general principle provides no guidance as to the question raised by these proceedings. *Societe Intenationale* was cited for the proposition that the power of the court is governed by Rule 37 of the Federal Rules. Rule 37, of course, gives the court the power to dismiss as well as to impose other sanctions.

Spivak and *Malloy* were cited to support the proposition that "in other contexts the Supreme Court of the United States has held that no penalty can be imposed for exercising the Fifth Amendment privilege against self-incrimination." (Appendix B at 3). The fact that these rulings were "in other contexts" is the important factor, not even discussed by the court. Of more relevance is the analogy made by the court in *Brown, supra,* that in a criminal case the well settled rule is that the defendant may choose *not* to testify but that once he voluntarily takes the witness stand he cannot then refuse to answer questions on cross-examination by claiming the privilege. In the instant case, since plaintiff chose to make these allegations, he cannot now refuse to answer questions concerning them by asserting the privilege. If he persists in doing so, then he must forego the benefit of making them at all. We point out that

5. The Court also relied on *Alioto v. Holtzman,* 320 F.Supp. 256 (E.D. Wisc. 1970) which apparently rules contrary to *Lyons* and *Brown* in permitting assertion of the privilege as to matters asserted by plaintiff. We submit that if so read, the case is clearly erroneous. On its facts, however, the privilege appeared to be asserted as to matters not directly related to or alleged in the complaint, therefore, it would be proper to permit assertion of the privilege.

even in criminal cases, persons may be faced with hard choices which mean giving up a constitutional privilege to achieve a benefit. *See, e.g., Brady v. United States,* 397 U.S. 742 (1970) (plea of guilty to avoid death penalty); *McMann v. Richardson,* 397 U.S. 759 (1970) (guilty plea induced by confession of doubtful admissibility); *Williams v. Florida,* 399 U.S. 78 (1970) (disclosure of alibi evidence or exclusion at trial).

We submit that the District Court's ruling that plaintiff could assert the privilege against self-incrimination as to matters *alleged in the complaint* is clearly erroneous, and that, in the absence of any other adequate remedy and the irreparable and incalculable injury to defendants the Ninth Circuit Court of Appeals abused its discretion in denying the writ. The question involved here is one of overriding importance in the conduct of the increasing number of civil rights cases flooding the federal courts. If plaintiffs are to be given access to the federal courts by mere vague assertions of illegal conduct by defendants (*See Haines v. Kerner,* 404 U.S. 519 (1972)), then it is of utmost importance that defendants are given the opportunity to test by discovery the allegations made. We do not suggest that by filing the suit, the plaintiff has irrevocably waived the privilege. We do suggest that the privilege is waived as long as the allegations remain in the complaint. The plaintiff has an election: if he makes the allegations he must respond to discovery concerning them. If he does not by asserting the privilege, then the allegations must be stricken. If the complaint then fails to state a claim or if fairness to defendants otherwise requires it, the action should be dismissed. Only this procedure adequately serves the purpose of the rules, and protects the rights of both plaintiffs and defendants.

CONCLUSION

Because of the importance of the question involved, we respectfully urge that the writ of certiorari be granted.

Dated: December 7, 1973

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(Appendices Follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

Filed—Sep 12 1973
Clerk, U. S. Court of Appeals

No. 73-2359
DC-C70-2423-OJC
Docketed

L. N. Patterson, O. E. Burnett,
R. D. Ezell, and L. A. Nelson,
Petitioners,

vs.

United States District Court,
Northern District of California,
Respondent,

Bernard C. Vun Cannon, et. al.
Real Parties in Interest.

Before: Merrill and Goodwin, Circuit Judges

ORDER

The writ of mandamus sought by petition filed herein on July 24, 1973, is denied.

/s/ CHARLES MERRILL
/s/ALFRED T. GOODWIN
U. S. Circuit Judges

Appendix B

In the United States District Court for the Northern District of California

No. C-70-2423-OJC

Bernard C. Vun Cannon, et al., *Plaintiffs,*

vs.

Allen F. Breed, et al., *Defendants.*

MEMORANDUM AND ORDER AFFIRMING IN PART MAGISTRATE'S FINDINGS

On February 22, 1973, this Court referred certain discovery motions made by defendants to Magistrate David Urdan. Plaintiff has filed a timely request of review of the Magistrate's Findings and Recommendations, filed March 5, 1973. On April 6, 1973, oral argument was heard on plaintiff's request and the matter was submitted on the briefs previously filed. In issue are seven interrogatories or parts of interrogatories addressed to plaintiff. Magistrate Urdan recommends an order compelling answers or further answers and he further recommends a protective order as to the answers to interrogatories 17, 16a-d. For the following reasons the Court will affirm the Magistrate's Findings as to interrogatories 14 and 17, and overrule the Magistrate as to interrogatory 16.

INTERROGATORY 14

The Magistrate's recommendation will be adopted and plaintiff will be ordered to answer as recommended in Magistrate Urdan's ruling on March 5, 1973.

INTERROGATORY 16(e)

This interrogatory asks plaintiff to identify the *sources* of his information and belief that knowledge of the threat to plaintiff was transmitted to defendants. The Court concludes that the plaintiff has answered this interrogatory. Although the defendants are dissatisfied with the plaintiff's answer, the cause of the dissatisfaction appears to be with the interrogatory. Defendants in their briefs claim they are seeking facts showing defendants' knowledge of the threat. However, plaintiff has listed, for whatever value they may be, the sources upon which he relies. It would take a different interrogatory to elicit the answers which defendants seek.

INTERROGATORIES 16(a), (b), (c), (d), and 17

Plaintiff has objected to answering these interrogatories claiming his Fifth Amendment privilege against self-incrimination and under F.R.Civ.P. 26(c)(1), that a protective order preventing answers is required to save plaintiff's life.

This civil action is brought by an inmate against the correctional personnel at Deuel Vocational Institute who allegedly conspired to allow another inmate stab plaintiff. In his amended complaint plaintiff states that he was stabbed because he was told by other inmates to stab a black inmate, but refused to do so. Interrogatories 16a-d seek factual details about these latter allegations.

Interrogatory 16(a) asks the plaintiff to identify the black inmate, identify each inmate who told him to stab the inmate, to state when and where such statements were made, to state the substance of each conversation, and to identify anyone with any knowledge of these statements. Interrogatory 16(b) asks the plaintiff to identify anyone with whom he discussed the stabbing, giving the time, place and substance of the conversation. Interrogatory 16(c) seeks

the identity of persons who allegedly told plaintiff that he would be killed if he failed to carry out the stabbing, including the time, place and substance of the discussion. Number 16(d) asks plaintiff to identify anyone with information concerning these threats. The defendants contend that there is no Fifth Amendment claim involved here and that the Court should dismiss the plaintiff's claim for withholding these answers, citing *Lyons v. Johnson,* 415 F.2d 540 (9th Cir. 1969). However, a few well established propositions should be reviewed before proceeding further.

There can be no doubt that the privilege against self-incrimination applies in civil actions. *McCarthy v. Arndstein,* 266 U.S. 34 (1924). Further, where sanctions for failure to answer interrogatories are sought, the Court has no inherent power to dismiss the action but must be governed by the provisions of F.R.Civ.P. 37. *Societe Internationale v. Rogers,* 357 U.S. 197 (1958). Federal Rule of Civil Procedure 26(b)(1) limits discovery to relevant matters that are not privileged. And in other contexts the Supreme Court of the United States has held that no penalty can be imposed for exercising the Fifth Amendment privilege against self-incrimination. *Spevack v. Klein,* 385 U.S. 511 (1967); *Malloy v. Hogan,* 378 U.S. 1 (1964).

First turning to the case of *Lyons v. Johnson, supra,* relied upon by defendants as authority to dismiss plaintiff's claim. The *Lyons* case involves an extreme factual situation where the plaintiff refused to comply with all requests for discovery. On its facts the case is clearly not applicable here, where only two of many interrogatories are in issue. The question for the Court is to decide whether plaintiff has properly raised his privilege against self-incrimination.

As Magistrate Urdan correctly stated, the standard is whether the information sought would furnish any evidence of a crime or a "link in the chain" of evidence needed to

prosecute for a crime. See *Hoffman v. U.S.*, 341 U.S. 479 (1951). The Magistrate found that no such possibility exists as to the answers to interrogatories 16a-d and 17. Although finding this a very close question, as to interrogatories 16a-d, the Court concludes that the Fifth Amendment privilege is properly claimed. The answers to 16a-d could furnish evidence of a conspiracy to stab another inmate in which conspiracy plaintiff could be implicated. Therefore, since this possibility does exist, the claim of privilege is appropriate. The motion to order plaintiff to answer interrogatories 16a-d will be denied. *Alioto v. Holtzman,* 320 F.Supp. 256 (E.D.Wis. 1970).

At this point the Court should warn the plaintiff that it will not allow plaintiff to further prejudice the defendants. It is plaintiff's choice to use his privilege but he will not be allowed to surprise and prejudice the defendants by testifying to the matters involved in interrogatories 16a-d should this case come to trial. See *Duffy v. Currier,* 291 F.Supp. 810 (D.C.Minn. 1968).

Plaintiff has also raised a Fifth Amendment protest to answering interrogatory 17. Number 17 asks plaintiff to describe in detail the stabbing incident of June 8, 1970, where plaintiff was the alleged victim, and to identify the person who stabbed him. The Court concludes that there is no danger of self-incrimination to plaintiff by answering this question. Therefore, the Magistrate's findings will be adopted along with his recommendation for a protective order, under F.R.Civ.P. 26 sealing the answers to interrogatory 17 filed with the Court and to be made available only to the parties to this action and to their counsel.

Accordingly, It Is Ordered that plaintiff answer defendants' interrogatory 14 as recommended by Magistrate Urdan's Finding of March 5, 1973;

It Is Further Ordered that plaintiff answer defendants' interrogatory 17 and that the answers be sealed and filed with the Court, and It Is Further Ordered that no person other than the parties to this action and their counsel be permitted to see these answers; and

It Is Further Ordered that defendants' motion to compel answers to interrogatories 16a-e be, and the same is, hereby denied.

Dated: May 3rd, 1973.

OLIVER J. CARTER
United States District Judge

Appendix C

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In the United States District Court for the Northern District of California

Civil Action No. C-70 2423 LHB

Bernard C. Vun Cannon, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

Allen F. Breed, James Stratten, C. R. Byrne, Roger C. Chandler, Julio Gonzales, William L. Richey, Mrs. Paula A. Tennant, and Ralph Wright, individually and in their official capacities as members of the Youth Authority Board, State of California; R. N. Procunier, individually and in his official capacity as Director of Corrections for the State of California; L. N. Patterson, individually and in his official capacity as Superintendent of Deuel Vocational Institution; Sergeant L. A. Nelson, Correctional Officer R. Ezell, and Correctional Officer D. E. Burnett, individually and in their official capacities as officers and employees of the Department of Corrections and/or Deuel Vocational Institution; their agents, employees, and successors in interest,

Defendants.

AMENDED COMPLAINT FOR VIOLATION OF CIVIL RIGHTS, FOR DECLARATORY AND INJUNCTIVE RELIEF, AND FOR DAMAGES, AND DEMAND FOR JURY TRIAL.

Pursuant to Rule 15, Federal Rules of Civil Procedure, Plaintiffs herein amend their complaint as a matter of course before a responsive pleading is served, and in lieu of the complaint filed November 12, 1970, substitute the following amended complaint:

FIRST CAUSE OF ACTION

1. This is a civil action brought by Plaintiff Bernard C. Vun Cannon on behalf of himself and all others similarly situated pursuant to Sections 1983, 1985, 1986 and 1988 of Title 42 of the United States Code and the First, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States, for a declaratory judgment, for a preliminary and a permanent injunction, and for damages. This court has jurisdiction of this action under 28 U.S.C. §§1343, 2201, and 2202, this being an action to redress the deprivation of rights, privileges, and immunities secured by the Constitution of the United States. Pursuant to 28 U.S.C. §§ 2281 and 2284 it is requested that a three-judge court be convened to hear and determine this action. Plaintiff Vun Cannon seeks (a) damages for the personal injuries which resulted from the intentional wrongdoing or from the negligence of Defendants and (b) an injunction enjoining Defendants from refusing to return to him certain legal papers. Plaintiff and the class he represents seek (i) a declaration that certain hearing procedures followed by the California Youth Authority Board pursuant to Section 04.1d of the Board's Manual are unconstitutional; (ii) a declaration that Section 2037 of the California Penal Code is unconstitutional; (iii) an injunction enjoining

Defendants from enforcing said Section 2037 by confining Plaintiff and the members of his class at Deuel Vocational Institution, Tracy, California; and (iv) an injunction enjoining Defendants from enforcing said Section 04.1d by continuing to hold Board meetings without affording Youth Authority wards certain precedural rights.

PARTIES

2. Plaintiff Vun Cannon is 21 years of age, and is a citizen of the United States. On November 12, 1969, Plaintiff was found guilty of violating Section 4532(b) of the California Penal Code by the Superior Court for Sacramento County and was committed to the California Youth Authority (the "Youth Authority"). On February 3, 1970, pursuant to an order of the Youth Authority Board (the "Board"), Plaintiff was transferred to Deuel Vocational Institution ("DVI"), Tracy, California, where he was confined until September, 1970. Since late September, 1970, Plaintiff has been confined at California Correctional Institution, Tehachapi, California. Plaintiff is informed and believes, and on that basis alleges that he is and at all times material herein was addicted to narcotics. Plaintiff, who is a Caucasian, is and at all times material herein was a member of the American Nazi Party.

3. With respect to the Fourth Cause of Action herein, Plaintiff brings this action as a class action, individually and on behalf of all others similarly situated. The class includes all persons who have been committed by a criminal court to the Youth Authority, and who were thereafter transferred by the Youth Authority to DVI. As to such class of persons, (a) it is so numerous that joinder of all members is impracticable; (b) there are questions of law and fact common to the class; (c) the claims of Plaintiff Bernard C. Vun Cannon are typical of the claims of the

class; and (d) Plaintiff will fairly and adequately protect the interests of the class. In addition, (i) the prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications, or substantially impair and impede their ability to protect their interest; and (ii) the parties opposing the class have acted and refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

4. Defendants Breed, Stratten, Byrne, Chandler, Gonzales, Richey, Tennant, and Wright, and each of them, are members of the Board. Defendant Breed is the Board's Chairman. At all times material herein, Defendant Procunier was Director of the Department of Corrections of the State of California; Defendant Patterson was Superintendent of DVI; and Defendants Nelson, Ezell and Burnett were correctional officers at DVI, and employees of the California Department of Corrections. Defendants are sued both individually and in their official capacities as set forth herein. In depriving Plaintiffs of their constitutional rights, as set forth hereinafter, Defendants, and each of them, have acted and continue to act under color of the statutes, ordinances, regulations, customs and usage of the State of California. Plaintiff is informed and believes and on that basis alleges that Defendant Stratten maintains his offices and also resides in the City and County of San Francisco.

FACTS

5. a. In order to more easily operate California prisons it is, upon information and belief, a common practice for

prison officials—including Defendants Patterson, Ezell, Burnett and Nelson—to actively foster, promote and maintain intense inmate hostility among different racial and ethnic groups, and among inmates of different ideological, political or religious views, and thereby (i) deflect such hostility away from prison officials and the prison system, and (ii) utilize such hostility (and the physical violence that often results therefrom) as a form of punishment and discipline.

b. It is also common in the California prison system to employ as correctional officers Caucasians who are prejudiced against and hostile toward persons who are (i) black or (ii) members of (or who vocally advocate ideas associated with) the American Nazi party or other so-called extremist political groups. At all times material herein, Defendants Patterson, Ezell, Burnett, and Nelson, upon information and belief, shared such prejudices against blacks and against persons whom they believe to be associated with the American Nazi party.

c. In connection with the practices of fostering racial and ideological hostility among inmates, as described in paragraph 5a hereof, and in connection with their own prejudices against blacks and political "extremists", as described in paragraph 5b hereof, it is upon information and belief a common practice among correctional officers at DVI, as well as at other California prisons, to "set up" a particular inmate by (i) releasing him into a particular area (*e.g.*, the tier in front of his cell or a recreational area) with one or more other inmates (usually of a different race or ideology) whom the guards know or believe will attack, injure (usually by stabbing) and perhaps kill the "set up" inmate and (ii) purposely failing to protect the "set up" inmate while he is being attacked and injured; and occa-

sionally, the correctional officers will themselves actively encourage and/or arm the inmates who are to do the attacking. That such practices exist at DVI was, upon information and belief, well known to Defendants Breed and Procunier at all times material herein. In addition, at all such times Defendants Breed, Patterson, Nelson, Ezell and Burnett knew and disapproved of Plaintiff's Nazi beliefs and affiliations, and their acts and omissions hereinafter complained of were proximately caused by said Defendants' opposition to, and attempts at intimidating and repressing, said beliefs and affiliations.

6. On or about March 23, 1970, at about 10:00 p.m., Plaintiff was returning to his cell in G Wing from a workout with the boxing team. Shortly before reaching his cell, a commotion broke out in the wing. Plaintiff proceeded directly to his cell, but the cell locking mechanism was set in such a way that his door was locked and he therefore could not enter his cell. At that point, correctional officers began releasing tear gas in the wing, and to avoid its effects Plaintiff entered a nearby cell which was unlocked. Approximately five other inmates also took refuge in this cell, where they all remained for about forty-five minutes. During this period of time the various cells on the wing, including the cell which Plaintiff had entered, were locked by a remote locking device. Thereafter, officers came by checking identification cards, after which the officers came back and took all six persons out of their cell; made them strip completely; and marched them off to K Wing, where they were put in an isolation cell.

On March 24, 1970, Plaintiff was taken before a prison disciplinary tribunal commonly known as "Court", where an official told Plaintiff he would get 29 days in Isolation because of the incident. Upon information and belief, Plain-

tiff was charged with and found "guilty" of (1) being in another inmate's cell, rather than his own cell; (2) destroying jail property; and (3) distributing Nazi propaganda. In fact, Plaintiff destroyed no property and distributed no propaganda of any sort and was in another inmate's cell only because of the circumstances described in this Paragraph 6. Plaintiff plead not guilty but was summarily found guilty and sent to an isolation cell in K Wing.

7. In late May or early June, 1970, Plaintiff was ordered by other inmates to stab a black inmate but refused to do so. As a result of this refusal, Plaintiff was told that he would be killed and on June 5, 1970, he wrote a letter to Defendant Breed to so inform him and on that date gave said letter to the appropriate DVI official for mailing. Upon information and belief, knowledge that Plaintiff's life had been threatened and that he would soon be stabbed by a particular inmate was transmitted by one or more inmates, either orally or in writing, to one or more of the correctional officer Defendants herein, to-wit: Nelson, Ezell, and Burnett, who in turn transmitted said information to the other two. As a result of the foregoing facts, Defendants Breed, Patterson, Nelson, Ezell and Burnett were all aware—on or before June 7, 1970—that Plaintiff was in danger of an imminent and serious attack upon his person by a particular DVI inmate. However, upon information and belief, because of their own racial and political views, as set forth in Paragraph 5b hereof; because of their practice of fostering racial hostility among inmates, as set forth in Paragraph 5a hereof; and in order to summarily punish Plaintiff for (a) his alleged part in the March 23, 1970 disturbance; (b) his Nazi political views and activities, and (c) his refusal to attack a black inmate, Defendants Patterson, Nelson, Ezell and Burnett took no

action to protect Plaintiff and thereby actively participated in the attack upon him, which is more fully described in Paragraph 8 hereof. Defendant Breed also took no action to protect Plaintiff, although it was within his power as Director of the Youth Authority to do so.

8. On or about June 8, 1970, at about 8:30 a.m., Plaintiff was alone in his cell, lying on his bunk. The door to his cell was closed, and the cell locking device was set in such a way that it could not be opened unless a guard were to "rack" it. Shortly thereafter, said door was opened from the outside and, upon information and belief, the adult inmate whom Defendants had been told would attack Plaintiff entered the cell, pulled out a knife-like instrument, and attacked Plaintiff. The assailant stabbed Plaintiff three times with the instrument: the first time under Plaintiff's heart, then in his arm, and finally in his side. Plaintiff yelled out the first time he was cut in a loud voice, and tried to get up. Finally, he was able to kick the knife out of his assailant's hand, whereupon the assailant left Plaintiff's cell. During this period of time Defendants Nelson, Ezell and Burnett were, upon information and belief, each in close proximity to Plaintiff's cell and each (a) saw the assailant enter Plaintiff's cell, (b) believed that Plaintiff was being attacked, and (c) heard Plaintiff cry out that he was being attacked. Nevertheless, upon information and belief, said Defendants intentionally and maliciously allowed the assailant to enter Plaintiff's cell, failed to keep Plaintiff's cell under observation while assailant was inside it, and did not respond to the shouts which Plaintiff made as he was being attacked, even though they were clearly heard by said Defendants.

After Plaintiff was stabbed as aforesaid, he was taken to the DVI hospital. However, while he was being given emer-

gency medical treatment various DVI officials interrogated him, took pictures and the like, even though said treatment was still being administered and even though Plaintiff was in considerable pain and suffering from severe emotional shock and mental anguish.

9. As a result of personal correspondence, medical examination, official records, and other sources of information, Defendants Breed, Procunier, and Patterson knew, at all times material herein, that Plaintiff's addiction to narcotic drugs was an acute physical condition which urgently needed medical care. Although it was within their power to provide the necessary medical treatment, said Defendants —prior to September of 1970—failed or refused to provide it, as a result of which Plaintiff suffered and continues to suffer serious physical and emotional injury.

10. While acting under color of law of the State of California, as more fully set forth in Paragraphs 5 through 9 hereof, Defendants have deprived Plaintiff of the following rights which are secured to him by the United States Constitution:

a. The right not to have punishment summarily inflicted upon him while he is confined under Defendants' control, which is guaranteed to him by the Fourteenth Amendment;

b. His right to freedom of expression and association, even with respect to matters which are unpopular or with which Defendants and their agents and employees do not agree, which is guaranteed to him by the First and Fourteenth Amendments;

c. His right to be free from cruel and unusual punishment, which is guaranteed to him by the Eighth and Fourteenth Amendments; and

d. His right to receive treatment for his drug addiction problem while he is under the custody and control of Defendants, which is guaranteed to him by the Eighth and Fourteenth Amendments.

11. In acting or refusing to act in the manner set forth in Paragraphs 5 through 10 hereof, Defendants have acted or refused to act knowingly, maliciously, and with the intent to harm Plaintiff.

12. As a direct and proximate result of the wantonness of Defendants, and each of them, and the resulting attack and stabbing, Plaintiff was injured in his health, strength, and activity, sustaining injury to his body and shock and injury to his nervous system, all of which said injuries have caused and continue to cause Plaintiff great mental, physical, and nervous pain and suffering. Upon information and belief, Plaintiff alleges that he will continue to suffer extreme pain in the future as a result of said injuries and the medical treatment made necessary thereby; that some of his injuries, including residual scars, are permanent in nature; and that he will for an indefinite period in the future be compelled to make expenditures for medical services, medicines, and to pay other expenses in the treatment and relief of the aforementioned injuries.

13. As a result of the deprivation and injuries described above, Plaintiff has suffered grave and lasting physical, mental, and emotional harm, and has been injured by Defendants Breed, Patterson, Procunier, Nelson, Ezell and Burnett in the amount of one hundred thousand dollars ($100,000.00); and is entitled to recover an additional one hundred thousand dollars ($100,000.00) from said Defendants as punitive damages.

SECOND CAUSE OF ACTION

14. Plaintiff realleges and incorporates herein by reference each and every allegation contained in Paragraphs 1 through 12 of his First Cause of Action.

15. As a direct and proximate result of the negligence of Defendants Breed, Patterson, Procunier, Nelson, Ezell

and Burnett, as set forth in Paragraphs 5 through 10 hereof, Plaintiff has suffered the injuries, shock, pain, suffering, disabilities, and expenditures set forth in Paragraph 12 hereof, and has suffered damages in the amount of one hundred thousand dollars ($100,000.00).

THIRD CAUSE OF ACTION

16. Plaintiff realleges and incorporates herein by reference each and every allegation contained in Paragraphs 1 through 12 of his First Cause of Action.

17. Upon information and belief, Defendants Ezell, Burnett and Nelson, and each of them, at some time or times between January 1 and June 8, 1970, conspired and acted jointly and in concert, under color of law of the State of California, with the purposeful intent of (a) impeding and defeating the due course of justice in the State of California, (b) depriving Plaintiff of due process and equal protection of the law, and (c) invidiously and unlawfully discriminating between Plaintiff and other inmates at DVI, thereby subjecting Plaintiff to a deprivation of his right to due process and to the equal protection of the laws. Plaintiff is informed and believes, and on that ground alleges, that in furtherance of the objects of such conspiracy, and during its course, said Defendants, acting under color of the law of State of California and in concert with each other and with the aforesaid intent, acted (or refused to act) on June 8, 1970 in the following ways:

a. Purposely left the door-locking mechanism in such a position that the door to Plaintiff's cell was unlocked and could be opened from the outside, at a time when they knew that (i) Plaintiff was alone in his cell and (ii) the inmate who intended to attack Plaintiff was free on the tier;

b. Saw Plaintiff's assailant enter Plaintiff's cell and did nothing to stop him, although they knew that he had threatened Plaintiff and intended to attack him;

c. Heard Plaintiff's cries for help and yet did not promptly respond; and

d. Permitted Plaintiff to be interrogated and photographed unnecessarily while he was still receiving emergency medical treatment for his stabbing in the prison hospital, and was still in considerable pain.

Said acts were taken with the purpose and intent of subjecting Plaintiff to the deprivation of those constitutional rights set forth in Paragraph 10 hereof, and thereby to impede, hinder, obstruct and defeat the due course of justice in the State of California.

18. Upon information and belief, Defendants Breed and Patterson knew—on and immediately prior to June 8, 1970—that the wrongs conspired to be done as set forth in Paragraph 17 hereof were about to be committed. Although said Defendants, and each of them, had the power to prevent or aid in preventing the commission of said wrongs, said Defendants, and each of them, neglected or refused to do so. As a result of such neglect or refusal, said wrongful acts were committed and Plaintiff was injured as set forth in Paragraph 12 hereof.

19. As a direct and proximate result of the conspiracy described in Paragraph 17 hereof, of the acts committed in furtherance thereof by Defendants Nelson, Ezell and Burnett, and of the refusal of Defendants Breed and Patterson to prevent the commission of said act, as described in Paragraph 18 hereof, Plaintiff has suffered injuries, shock, pain, suffering, disabilities and expenditures set forth in Paragraph 12 hereof, and has suffered damages in the amount of one hundred thousand dollars ($100,000); and is entitled to recover an additional one hundred thousand dollars ($100,000) from said Defendants as punitive damages.

FOURTH CAUSE OF ACTION

20. Plaintiff realleges and incorporates herein by reference each and every allegation contained in Paragraphs 1 through 4 of his First Cause of Action.

21. Under the provisions of Section 1737.1 of the California Welfare and Institutions Code, any person who has been convicted of a public offense by a criminal court and committed to the Youth Authority may not be transferred directly by the Youth Authority to a State prison; the Youth Authority may only return him to the committing court, which court may thereafter commit him to a State prison or a county jail in accordance with the provisions of said Section, pursuant to a judicial proceeding which affords such person all fundamental due process safeguards. On the other hand, Section 2037 of the California Penal Code authorizes the Director of the Youth Authority to administratively transfer to DVI "any male" subject to his custody who the Director "believes will be benefited by confinement in such an institution." This authority has, upon information and belief, been delegated by the Director to the Youth Authority Board.

22. The transfer of Plaintiff and the class he represents to DVI was in each case made by the Youth Authority Board after an informal hearing, without (i) advance written notice of the hearing; (ii) representation by an attorney at the hearing; (iii) opportunity to confront and cross-examine witnesses or to call their own witnesses; or (iv) a written decision setting forth the evidence and the reasons supporting the Board's decision. Plaintiff is informed and believes, and on that basis alleges that many of these transfer decisions were arbitrary and unreasonable, and were supported by no evidence other than unsubstantiated —and in some cases inaccurate—reports of Youth Author-

ity officials which had been reduced to writing and which were contained in the Youth Authority's files. Such practices and procedures are consistently followed by the Board, in accordance with Section 04.1d of the *Youth Authority Board Manual,* which reads as follows:

> "04.1d. Board hearings are to be limited to panel members, staff team members presenting the case, and a clerk when available. The decision as to whether other persons shall observe the Board process shall be made by the acting Chairman in advance of the hearing. When visitors are in the Board room, they are to be seated so that the attention of the ward is not distracted in any way. Normally there would be no more than three visitors at any Board meeting but exceptions to this may be made by the panel Chairman. Every effort shall be made to see that visitors coming or going or messages being brought to the Board do not cause distraction and come and go only between cases." Board Policy Manual § 04.1d.

23. DVI is an "intermediate security type institution" (Penal Code, § 2035) which is managed and operated by the Director of Corrections (Penal Code, 2038-2040). Although denominated an "institution" it is in all material respects a prison which, upon information and belief, is run in exactly the same basic manner as any other California prison under the Director's control. Because DVI is an "intermediate security" facility, it actually has tighter security and utilizes more oppressive measures than do several other California Penal Institutions. It is, therefore, an institution which is functionally distinct from, and far more punitive and harmful than, institutions operated by the Authority.

DVI is surrounded by two high fences with barbed wire on top. It has eight guard towers which are continually

manned by guards who are, upon information and belief, armed with high-powered weapons which they are authorized to fire at inmates under certain circumstances. Access is strictly controlled and to enter or leave DVI a person must pass through several access points which are controlled by armed guards.

Inmates at DVI are kept in cells, with locked doors and barred windows. Upon information and belief, the guards, or "correctional officers," are armed with pipes, which spray gas (sometimes called "gas billies,") and which are used upon inmates, usually in the "Isolation" area. The several types of confinement at DVI include "Isolation," which consists of locking an inmate (sometimes for lengthy periods of time) in a small room with only a toilet, a bed and a sink.

Inmates of DVI include both Authority wards, most of whom are minors, and adult felons transferred to DVI by the Department of Corrections. Except for a policy of not having Authority wards placed in the same cell with adult felons, there is, upon information and belief, *absolutely no segregation of wards and felons.* Both wards and felons share the same cell blocks, the same dining and recreation programs, and do so in groups composed of both wards and felons.

DVI is dangerous. Upon information and belief, many if not most of its inmates have on their person, from time to time, various types of homemade weapons; and DVI officials are either unable or unwilling to insure the safety of either the wards or the felons, and numerous incidents of violence, including stabbings, continually occur. Therefore many if not most of the wards are continually in fear for their own safety or, conversely, fearful that they will be provoked into a fight or forced to defend themselves and consequently be punished by DVI officials for their involvement in such an incident.

The circumstances under which Youth Authority wards are confined at DVI are extremely harmful to them, and, upon information and belief, cause severe and continuing mental and emotional damage. In addition, their constant association with adult felons is extremely injurious, not only from the point of view of the wards' safety but also from their inclination to adopt the values and habits of said felons. As a result, confinement at DVI does not provide the type of rehabilitation and treatment for wards required by the California Welfare and Institutions Code and by the United States Constitution, but, on the contrary, operates to transform said wards into hardened criminals.

24. No rational or factual basis exists for a distinction between the type of procedural safeguards to be accorded wards who are to be committed to DVI and those who are to be committed to some other state prison. The administrative, *ex parte* transfer of Plaintiff and the members of his class to DVI by the Youth Authority Board pursuant to summary procedures devoid of procedural safeguards violates their right to due process and to the equal protection of the laws, secured to them by the Fourteenth Amendment to the United States Constitution. Such action by Defendants was and is being taken under color of law of the State of California.

25. An actual controversy has arisen and now exists relating to the rights and duties of the parties, in that Plaintiff and his class have been denied and continue to be denied their constitutional rights.

26. Plaintiffs have been and will continue to be irreparably injured by the aforesaid conduct of Defendants unless this Court grants the relief sought herein. Plaintiffs have no plain, adequate, or complete remedy at law to redress the unlawful acts complained of herein.

FIFTH CAUSE OF ACTION

27. Plaintiff realleges and incorporates herein by reference each and every allegation contained in Paragraphs 1 through 11 of his First Cause of Action.

28. On March 23, 1970, at the time Plaintiff was transferred to Isolation, he had in his possession certain legal documents which he had prepared and was in the process of preparing, including documents relating to an appeal from his conviction and papers containing the results of considerable legal research. During the time Plaintiff was in Isolation he asked Defendant Ezell and other DVI correctional officers that these documents be returned to him, but these requests were all denied. Although Plaintiff has upon numerous occasions asked officials who are employees and agents of the Department of Corrections and of Defendants Procunier and Patterson that these materials be returned to him, said officials have refused and continue to refuse to return said materials to Plaintiff, thereby acting under color of law of the State of California to deprive Plaintiff of his rights under the First, Sixth and Fourteenth Amendments to the United States Constitution.

29. Plaintiff has been and will continue to be irreparably injured by the aforesaid conduct of Defendants unless this Court grants the relief sought herein. Plaintiff has no plain, adequate, or complete remedy at law to redress the unlawful acts complained of herein.

Wherefore, Plaintiffs respectfully request that, after a full hearing, the Court:

1. Issue a declaratory judgment that (a) Section 04.1d of the California Youth Authority Board Manual and the procedures followed by the Board as described in Plaintiff's Fourth Cause of Action herein violate the Sixth and Four-

teenth Amendments of the United States Constitution, and (b) Section 2037 of the California Penal Code and the practice of administratively transferring Youth Authority wards to DVI violates the Fourteenth Amendment to the United States Constitution;

2. Issue a preliminary injunction and thereafter a permanent injunction which will:

a. Enjoin Defendants from enforcing Section 2037 of the California Penal Code by administratively transferring Youth Authority wards from Youth Authority institutions to DVI on the ground that said Section and practice violate the Fourteenth Amendment to the United States Constitution;

b. Enjoin Defendants from enforcing Section 04.1d of the California Youth Authority Board Manual by continuing to hold hearings which do not afford Youth Authority wards the procedural rights described in Paragraph 22 hereof, on the ground that said Section and practice violate the Sixth and Fourteenth Amendments to the United States Constitution;

c. Require Defendants to transfer the members of Plaintiff's class from DVI to an institution under the jurisdiction of the Youth Authority, and prohibit the retransfer of Plaintiff and his class to DVI except pursuant to judicial proceedings at which they are afforded the aforementioned procedural rights;

d. Require Defendants to return to Plaintiff those documents described in Paragraph 28; and

e. Prohibit Defendants, and each of them, and any person associated with them, from harassing, threatening, punishing, or in any way retaliating against Plaintiff or any member of his class for having filed this action;

3. Award Plaintiff Vun Cannon one hundred thousand dollars ($100,000.00) as compensatory damages, and an additional one hundred thousand dollars ($100,000.00) as punitive damages; and

4. Grant such other and further relief as this Court deems just and proper, and retain continuing jurisdiction of this matter.

Dated: January 27, 1971.

PENROD & HIMELSTEIN
B. E. BERGESEN, III
ARMANDO M. MENOCAL, III

By /s/ B. E. BERGESEN, III
Attorneys for Plaintiffs

Plaintiff hereby demands a trial by jury.

/s/ B. E. BERGESEN, III
B. E. Bergesen, III
Attorney for Plaintiff

Appendix D

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In the United States District Court for the Northern District of California

No. C-70-2423 OJC

Bernard C. Vun Cannon, individually and on behalf of all others similarly situated,
Plaintiffs,

vs.

Allen F. Breed, et al.,
Defendants.

ANSWER OF PLAINTIFF BERNARD VUN CANNON TO DEFENDANTS' INTERROGATORIES

Plaintiff Bernard C. Vun Cannon submits the following answers or objections to defendant's interrogatories.

Interrogatory No. 1. State your full name, date of birth, birthplace and present residence and mailing address.

Answer to Interrogatory No. 1. Bernard Charles Vun Cannon; born July 18, 1949, Royal Oak, Michigan. Present

mailing address: P. O. Box 441, Palm Hall, Chino, California 91710.

Interrogatory No. 2. State whether you are presently incarcerated in a California prison facility and, if so, the name and location of that facility.

Answer to Interrogatory No. 2. Yes. California Institution for Men, Chino, California 91710.

Interrogatory No. 3. If your answer to No. 2 is yes, set forth:

(a) the crimes of which you have been convicted and for which you are presently incarcerated;

(b) the courts in which you were convicted and the numbers of the court cases;

(c) the names of the attorneys who represented you, the then addresses of those attorneys and their present addresses;

(d) the pleas entered by you;

(e) if pleas of not guilty were entered, whether the convictions resulted from court trials or jury trials;

(f) whether you appealed the convictions and, if so, the courts entertaining the appeals and the results of the appeals.

Answer to Interrogatory No. 3.

(a) Robbery;

(b) Sacramento County Superior Court, action number unknown;

(c) Thomas McGilvray, Assistant Public Defender for Sacramento County, Sacramento, California;

(d) Guilty;

(e) Not applicable;

(f) No appeal.

Interrogatory No. 4. List all other felonies of which you have been convicted in California or in any other state or jurisdiction, setting forth:

(a) the crimes of which you were convicted;

(b) the courts in which you were convicted and the numbers of the court cases;

(c) the names of the attorneys who represented you, the then addresses of those attorneys and their present addresses;

(d) the pleas entered by you;

(e) if pleas of not guilty were entered, whether the convictions resulted from court trials or jury trials;

(f) whether you appealed the convictions and, if so, the courts entertaining the appeals and the results of the appeals.

Answer to Interrogatory No. 4. To the best of my recollection, my only other felony conviction, and related information, is as follows:

(a) Forgery;

(b) Sacramento County Superior Court; action number unknown;

(c) Everett Avilla, Deputy Public Defender for Sacramento County, Sacramento, California;

(d) Guilty;

(e) Not applicable;

(f) No appeal.

Interrogatory No. 5. List all misdemeanor or infractions of which you have been convicted and for which you have been incarcerated for any period of time, setting forth:

(a) the crimes of which you were convicted;

(b) the courts in which you were convicted and the number of court cases;

(c) the names of the attorneys who represented you, the then addresses of those attorneys and their present addresses;

(d) the pleas entered by you;

(e) if pleas of not guilty were entered, whether the conviction resulted from court trials or jury trials;

(f) whether you appealed the convictions and, if so, the courts entertaining the appeals and the results of appeals.

Answer to Interrogatory No. 5.

(a) (i) Drunk in public
(ii) Escape
(iii) Possession of narcotics paraphernalia
(iv) Assault and battery
(b) (i) Visalia Municipal Court
(ii) Sacramento County Superior Court
(iii) Sacramento Municipal Court
(iv) Tulare Superior Court
(c) (i) Do not remember
(ii) Mr. Robinson, Deputy Public Defender, Sacramento County, Sacramento, California
(iii) Mr. Robinson (same as above)
(iv) Do not remember
(d) (i) Guilty
(ii) Guilty
(iii) Guilty
(iv) Not Guilty
(e) (iv) Court trial
(f) (iv) No appeal

Interrogatory No. 6. Identify every penal institution, including prisons, jails, juvenile facilities, and military institutions, in which you have been incarcerated in California or elsewhere, indicating:

(a) name of facility and location;
(b) duration of the incarceration;
(c) reason for the incarceration.

Answer to Interrogatory No. 6.

(a) Facility	(b) Duration	(c) Reason
1. Los Angeles Juvenile Hall	Feb. to March 1964	I don't know, but I believe case worker made assignment from foster home.
2. Visalia Juvenile Hall	Dec. 1964 to Feb. 1965	I believe I was considered a dependent child, and perhaps probation was revocation.

(a) Facility	(b) Duration	(c) Reason
3. Reception Guidance Center at Perkins	April 1966	Juvenile Court commitment under § 602, Welfare & Inst. Code.
4. Preston School of Industry	May to Nov. 1966	Same as #3 above.
5. Visalia Juvenile Hall	May to June 1967	Parole violation.
6. Preston School of Industry	Aug. 1967 to June 1968	Juvenile Court commitment under § 602, Welfare & Inst. Code.
7. Visalia County Jail	August 1968	Conviction for being drunk in public.
8. Sacramento County Jail	Nov. 1968 to March 1969	Forgery conviction
9. Sacramento County Jail	May to Sept. 1969	Conviction for possession of narcotics paraphernalia.
10. Sacramento County Jail	Sept. to Nov. 1969	(1) CYA parole revocation, and (2) escape.
11. Reception Guidance Center —Deuel Vocational Inst. (DVI)	Nov. to Dec. 1969	Conviction for escape.
12. Youth Training School Ontario, Calif.	Dec. 1969 to Jan. 1970	Same as above.
13. DVI	Jan. to Sept. 1970	Same as above.
14. Calif. Rehabilitation Center	Sept. 1970 (about 1 week)	Same as above.
15. Calif. Institution for Men, Chino	Sept. 1970 (about 3 weeks)	Same as above.
16. Calif. Correctional Inst., Tehachapi	Oct. 1970 to March 1971	Same as above.
17. Sacramento County Jail	May 1971 to Jan. 1972	Robbery conviction.
18. Reception Guidance Center —Calif. Medical Facility, Vacaville	Feb. to March 1972	Probation revocation.
19. Calif. Training Facility, Soledad	March to June 1972	Same as above.
20. DVI	June to July 1972	Same as above.
21. Calif. Institution for Men, Chino	July to pres.	Same as above.

Interrogatory No. 7. Other than the court proceedings set forth in your answers to Nos. 3, 4, and 5, list all court proceedings, criminal and civil, in which you have been a party, disclosing:

(a) name of court and location;

(b) type of action;

(c) date of action;

(d) whether you were plaintiff, defendant, petitioner, respondent, or otherwise designated;

(e) the names of the attorneys who represented you, the then addresses of those attorneys and their present addresses;

(f) disposition or result of the action, or pending status of the action.

Answer to Interrogatory No. 7.

(1) (a) Los Angeles Juvenile Court;
(b) Placement as dependent child;
(c) 1964;
(d) defendant;
(e) I don't remember;
(f) I was released to my mother's custody.

(2) (a) Visalia Juvenile Court;
(b) Probation revocation;
(c) 1964;
(d) defendant;
(e) none;
(f) sent to Los Angeles Juvenile Hall, and to a boy's home.

(3) (a) Visalia Juvenile Court;
(b) probation violation;
(c) 1965;
(d) defendant;
(e) none;
(f) Sent to live with aunt and uncle in Sacramento.

(4) (a) Visalia Juvenile Court;
(b) Juvenile Court proceedings;
(c) 1966;
(d) defendant;
(e) don't recall;
(f) committed to CYA.

(5) (a) Visalia Juvenile Court;
(b) parole violation;
(c) 1967;
(d) defendant;
(e) don't recall;
(f) no disposition.

(6) (a) through (f) During 1970, I filed an unknown number of petitions for writ of habeas corpus in the San Joaquin County Superior Court while I was confined at DVI; I don't recall the number of petitions filed; in 1971, while I was confined in the Sacramento County Jail, I filed perhaps three such petitions in the Sacramento County Superior Court; and in 1972, while confined here at Palm Hall, I have filed perhaps two petitions with the Sacramento County Superior Court. In each case I was petitioner; each was filed *pro se;* and all of the petitions were denied.

Interrogatory No. 8. State whether you were ever incarcerated at Deuel Vocational Institution at Tracy and the date of such incarceration.

Answer to Interrogatory No. 8. I was incarcerated at DVI at Tracy from January to September of 1970.

Interrogatory No. 9. State whether you have ever made any complaints about the conditions of confinement or about your treatment or about any other matter while at Deuel Vocational Institution.

Answer to Interrogatory No. 9. Yes.

Interrogatory No. 10. If your answer to No. 9 is yes, set forth:

(a) a detailed statement of each complaint;

(b) the identity of the persons to whom the complaint was made;

(c) the disposition or result of each complaint.

Answer to Interrogatory No. 10. The complaints which I presently remember making are:

(1) (a) Inadequate and unappetizing food served in K wing;

(b) Sgt. Nelson;

(c) no action taken by the institution.

(2) (a) Complaint concerning being forced to leave DVI hospital under threats by Sgt. Nelson;

(b) Sgt. Nelson;

(c) he made me leave the hospital anyway, even though I was injured.

(3) (a) The type of incarceration at DVI, the absence of treatment, and the failure to treat my narcotics problem;

(b) Allen F. Breed, Director of the California Youth Authority;

(c) No action was taken, until after I was stabbed; thereafter, I was transferred to CRC and to Tehachapi.

(4) (a) The conditions of my confinement;

(b) to an assistant of the Governor;

(c) no action was taken, so far as I know.

(5) (a) Complaint concerning the stabbing incident;

(b) to same Governor's assistant;

(c) no action was taken, so far as I know.

(6) (a) Conditions of confinement at DVI, confinement in the hole unjustly, stabbing, and the like;

(b) petitions for writ of habeas corpus filed in the San Joaquin County Superior Court;

(c) denied.

Interrogatory No. 11. State the number of times you were charged with violations of institution's rules while in Deuel Vocational Institution, disclosing:

(a) nature of each charged infraction;

(b) dates of each charged infraction;

(c) dates you were served with notice of charges;

(d) dates of your hearings;

(e) pleas entered by you at hearings;

(f) your defenses, if any, at the hearings;

(g) disposition or result of each hearing;

(h) discipline, if any, received.

Answer to Interrogatory No. 11. To the best of my recollection, the DVI rules which I was charged with violating are approximately as follows:

(1) (a) Destroying property, being in another inmate's cell, and distribution of Nazi propaganda;

(b) March, 1970;

(c) no notice was given;

(d) March 24, 1970;

(e) not guilty;

(f) that I did not commit the acts charged;

On or about March 23, 1970, at about 10:00 p.m., I was returning to my cell in G wing from a workout with the boxing team. Shortly before reaching my cell, a commotion broke out in the wing. I proceeded directly to my cell, but the cell locking mechanism was set in such a way that my door was locked, and I therefore could not enter my cell. At that point, correctional officers began releasing tear gas in the wing, and to avoid its effects I entered a nearby cell

which was unlocked. Approximately five other inmates also took refuge in this cell, where we all remained for about forty-five minutes. During this period of time the various cells on the wing, including the cell which I had entered, were locked by a remote locking device. Thereafter, officers came by checking identification cards, after which the officers came back and took all six of us out of the cell; made us strip completely; and marched us off to K Wing, where they put us in an isolation cell. In fact, I destroyed no property and distributed no propaganda of any sort and was in another inmate's cell only because of the circumstances described above;

(g) guilty;
(h) 29 days in isolation.

(2) (a) Faking an injury;
(b) Spring, 1970;
(c) no notice given;
(d) unknown;
(e) not guilty;
(f) was really injured, not faking;
(g) charges dismissed;
(h) not applicable.

(3) (a) Fighting;
(b) June, 1970;
(c) no notice given;
(d) unknown;
(e) not guilty;
(f) was attacked by another inmate;
(g) not guilty, victim of attack;
(h) not applicable.

(4) (a) disrespect;
(b) August, 1970;

(c) no notice given;
(d) unknown;
(e) not guilty;
(f) was not disrespectful;
(g) guilty;
(h) 10 days in isolation.

Interrogatory No. 12. Do you belong or have you ever belonged, while incarcerated in a California institution, to any inmate organizations, associations or confederations and, if so, disclose:

(a) the name of each organization;

(b) the size of each organization;

(c) the identity of the leaders of each organization and their code names;

(d) your position in each organization;

(e) the purposes, functions, goals or aims of each organization;

(f) where documents related, connected or in any way associated with each organization are maintained and by whom.

Answer to Interrogatory No. 12. No.

Interrogatory No. 13a. Do you belong or have you ever belonged, while incarcerated in a California institution, to inmate organizations, associations or confederations which restrict membership on racial grounds.

Answer to Interrogatory No. 13a. No.

Interrogatory No. 13b. If your answer to No. 13a is yes, indicate:

(a) the name of each organization;

(b) the size of each organization;

(c) the identity of the leaders of each organization and their code names;

(e) the purposes, functions, goals, or aims of each organization;

(f) where documents related connected or in any way associated with each organization are maintained and by whom.

Answer to Interrogatory No. 13b. Not applicable.

Interrogatory No. 14. Set forth in detail all factual matters in support of your allegations in paragraphs 5a, b, and c of the amended complaint.

Answer to Interrogatory No. 14. The allegations contained in paragraph 5 of the complaint are strictly factual in nature, and speak for themselves.

Interrogatory No. 15. Set forth all sources of information in support of your allegations in paragraphs 5a, b, and c of the amended complaint, identifying each source and describing the substance of the information received.

Answer to Interrogatory No. 15. The following sources of information support each of the allegations that it is a common practice for California prison officials including the defendants, to promote ethnic and racial hostility between inmates; that California prison officials are hostile toward blacks and so-called extremist political groups; and that such officials "set up" inmates for attacks:

1. My own personal observation at different California prisons.

2. Robert Royce Snyder, 3075 Crescent Ave., Marino, California.

3. Other inmates whom I have met and with whom I have spoken in various California prisons, but I no longer recall their names.

4. Inmates and ex-inmates whom my attorneys have represented; their identities are privileged information and my attorneys object to disclosing this information on that ground.

5. Floyd William, address and employer unknown.

6. Jackson, Soledad Brother (Bantam 1971)

7. Minton, Inside: Prison American Style (Random House, 1971).

8. Maximum Security: Letters from Prison (E.F. Ditton & Co., 1972).

9. Black Caucus Report: Treatment of Prisoners at California Training Facility at Soledad Central, California State Legislature, July 1970.

10. House Committee on the Judiciary, Subcommittee No. 3, Part II, Hearings on Corrections, October 25, 1971, San Francisco, California, and additional testimony taken by the Committee.

Interrogatory No. 16a. On page 7 of the amended complaint you state you were told to stab a black inmate but refused to do so.

1. Identify the black inmate;

2. Identify each inmate who told you to stab the black inmate;

3. State when and where such statements were made;

4. State the substance of each conversation;

5. Identify anyone with any knowledge of these statements.

Answer to Interrogatory No. 16a. I object to answering the questions contained in this interrogatory on the advice of my attorney. To require an answer to these questions would violate my privilege against self-incrimination, secured by the Fifth and Fourteenth Amendments to the United States Constitution and would place my life in immediate and grave danger of reprisals from other inmates.

Interrogatory No. 16b. Identify anyone with whom you discussed the stabbing, giving the time and place of the discussion and the substance of the conversation.

Answer to Interrogatory No. 16b. I object to answering the questions contained in this interrogatory on the advice of my attorney. To require an answer to these questions would violate my privilege against self-incrimination, secured by the Fifth and Fourteenth Amendments to the United States Constitution and would place my life in immediate and grave danger of reprisals from other inmates.

Interrogatory No. 16c. Identify the persons telling you you would be killed for refusing to carry out the stabbing, giving the time and place of the conversation and its substance.

Answer to Interrogatory No. 16c. I object to answering the questions contained in this interrogatory on the advice of my attorney. To require an answer to these questions would violate my privilege against self-incrimination, secured by the Fifth and Fourteenth Amendments to the United States Constitution, and would place my life in immediate and grave danger of reprisals from other inmates.

Interrogatory No. 16d. Identify anyone with information concerning these threats.

Answer to Interrogatory No. 16d. I object to answering the questions contained in this interrogatory on the advice of my attorney. To require an answer to these questions would violate my privilege against self-incrimination, secured by the Fifth and Fourteenth Amendments to the United States Constitution and would place my life in immediate and grave danger of reprisals from other inmates.

Interrogatory No. 16e. Identify all sources of your "information and belief" that knowledge of this threat was transmitted to defendants as alleged on page 7 of the amended complaint.

Answer to Interrogatory No. 16e. Robert R. Snyder and several other inmates whose names I cannot presently recall told me that knowledge of this threat had in fact been transmitted to the guards on duty in K Wing. In ad-

dition, it was common knowledge among DVI inmates confined in K Wing that matters of this sort were routinely transmitted to the guards through conversations over the vents, and by inmate informers who were placed in K Wing to perform that function. In addition, it is highly improbable that defendant Ezell would have opened only my cell and that of my assailant on the morning in question by pure chance.

Interrogatory No. 17. Describe in detail the stabbing incident of June 8, 1970, and identify the person who stabbed you.

Answer to Interrogatory No. 17. At the time the stabbing incident occurred, I was lying on my bunk in my cell. As I was lying there, I heard the door to my cell open, and a person approached my bunk and started to swing at me with what appeared to be a knife. While I was lying down, and as I struggled to my feet, he swung and struck me with the knife several times, on the side, on my arm, and in my back. Eventually, I beat back my assailant. I felt dazed and shocked, and sat on my bunk for a considerable length of time before any official came into my cell. Defendant Burnett eventually took me to the prison hospital.

Interrogatory No. 18a. Were you treated for your stab wounds?

Answer to Interrogatory No. 18a. Yes.

Interrogatory No. 18b. If the answer to 18a is yes, describe in detail the treatment given, the medical personnel giving such treatment and the time of such treatment.

Answer to Interrogatory No. 18b. Upon reaching the hospital, an inmate M.T.A. cleaned off my wounds. However, before any medical treatment was given a number of photographs were taken, and a counselor and some other staff member told everybody (including the para-medical personnel) to leave the room. Although I think I had col-

lapsed lung at the time, these staff members interrogated me for about 15 to 20 minutes. After the interrogation was completed, I was taken to the x-ray room where the collapsed lung was discovered, and after that I was taken to surgery where I waited for about 10 minutes until a doctor arrived and treated the collapsed lung.

Interrogatory No. 19. Set forth in detail information concerning the taking of photographs referred to on page 8 of the amended complaint.

Answer to Interrogatory No. 19. As I recall, it was an inmate who took the pictures of me sitting in a wheelchair. I was instructed to sit in a particular way, to hold up my arm, and the like, all of which directions I complied with, although I was in considerable pain.

Interrogatory No. 20. Set forth in detail information concerning the interrogation referred to on page 8 stating:

(a) The name of the official;

(b) The date and time of the interrogation;

(c) The questions asked and the responses made.

Answer to Interrogatory No. 20. Although I'm not entirely sure of the following identifications, I believe that the interrogators included a counselor named Scott, and perhaps defendents; I believe that there were a total of about four interrogators participating. I believe the interrogation took place for about 15 to 20 minutes. The interrogators asked me who did it and why, and I told them that I didn't know.

Interrogatory No. 21. Set forth in detail the following information concerning the narcotics addiction referred to on page 9 of the amended complaint:

(a) Identify the narcotic(s) to which you are addicted;

(b) When did you first use this narcotic;

(c) Did you use this narcotic while incarcerated at Deuel Vocational Institution.

(d) If the answer to c is yes, describe in detail each incident of use, identifying

1. the source;
2. the kind and amount of the narcotic;
3. the date and time obtained;
4. the date and time used;
5. the physical effects of use.

(e) If the answer to c is no, give the time and place of your last use of narcotics and the type of narcotics used, describing any physical manifestations of withdrawal, and explain your continuing addiction.

(f) Have you ever requested treatment for narcotics addiction.

(g) If such treatment has been given, describe it or, if refused, state in detail circumstances of the refusal.

(h) Are you presently addicted to narcotics?

(i) If the answer to h is no, describe the circumstances of losing or being cured of the addition;

(j) Are you now using narcotics.

Answer to Interrogatory No. 21.

(a) There was a time when I was addicted to heroin.

(b) I first used this narcotic in about 1967.

(c) No.

(d) Not applicable.

(e) Approximately September, 1969, prior to entering Sacramento County Jail; heroin, suffered sleeplessness, vomiting, indigestion, for a period of several days.

(f) Yes.

(g) Treatment was neither given nor refused.

(h) No.

(i) Passage of time; don't need it any more.

(j) No.

Interrogatory No. 22. Describe the injuries sustained in the June 8, 1970, stabbing.

Answer to Interrogatory No. 22. The main physical injuries are apparently puncture wounds and collapsed lung. There may be other injuries of which I am presently unaware.

Interrogatory No. 23. Describe in detail the "mental, physical and nervous pain and suffering" referred to on page 10 of the amended complaint.

Answer to Interrogatory No. 23. It is still very difficult for me to sleep, and I get very few hours of sleep each night. When I do sleep, I sleep fitfully, and I often have terrifying dreams of being stabbed again, dreams which continue to this day. When I am awake I am much more suspicious of people than I used to be, I am filled with anxiety, and am constantly on guard. I am much more nervous than I was before the stabbing and constantly have apprehensions that I may be stabbed again. I feel that there may be a weakness in my lung, because it does not feel normal, and because I occasionally have some pain in that general area. As a result, I am quite anxious about the possibility of a serious physical disability in the future.

Interrogatory No. 24. Describe in detail all the treatment of the stabbing wounds undergone since leaving Deuel Vocational Institution setting forth in each instance:

(a) reason for treatment;
(b) nature of treatment;
(c) time and date;
(d) name of doctor or hospital;
(e) cost.

Answer to Interrogatory No. 24. None. I did not have enough money, when I was on parole, to consult a private doctor. I asked my CYA parole officer if there was any money to provide medical treatment for me, but he said no.

Interrogatory No. 25. Identify all other expenditures made for treatment or relief of injuries incurred in the June 8, 1970, stabbing.

Answer to Interrogatory No. 25. None.

Interrogatory No. 26. Set forth in detail the following information concerning the legal material referred to on page 17 of the complaint.

(a) Identify each legal document, paper or other matter in your possession at the time of your transfer to isolation on March 23, 1970.

(b) Describe the appeal referred to and identify those documents relating to it and their relation to it.

(c) If loss of the documents had any effect of this appeal, describe the effect in detail.

(d) Describe in detail each request made to a correctional office concerning this material indicating date and time of request, name of officer, substance of request, and reply made.

Answer to Interrogatory No. 26.

(a) Legal tablets; volumes of United States Code, California Penal Code, California and Federal reported cases.

(b) I can no longer recall what the documents referred to.

(c) Impaired effectiveness and materials included in petitions for habeas corpus filed with San Joaquin Superior Court.

(d) Several requests made to different officers, but I no longer recall the dates or officers. All requests were denied.

Dated: November 6, 1972

PENROD & HIMELSTEIN
B. E. BERGESEN, III
ARMANDO M. MENOCAL, III
By /s/ ARMANDO M. MENOCAL, III
Attorneys for Plaintiffs

Bernard C. Vun Cannon, being duly sworn, deposes and says:

I am a party to the above entitled matter; the foregoing answers to interrogatories are true of my own knowledge, except as to the objections therein made on my behalf by my attorneys herein, and the matters which are therein stated on my information or belief, and as to those objections and matters I believe them to be true.

/s/ Bernard C. Vun Cannon
Bernard C. Vun Cannon

Subscribed and sworn to before
me this 13 day of November, 1972.
Ann Kosh, Notary Public

[Seal]

Appendix E

In the United States District Court
For the Northern District of California

Original Filed—Mar 5 1973
Clerk, U.S. Dist. Court San Francisco

NO. C-70-2423 OJC

BERNARD C. VUN CANNON, et al.,
Plaintiffs,

vs.

ALLEN F. BREED, et al.,
Defendants.

FINDINGS AND RECOMMENDATIONS

On February 23, 1973, defendants' motions to compel answers to interrogatories, to dismiss the complaint, and to strike allegations of the complaint were heard and submitted for decision on the files and records and discussion by counsel.

It is my recommendation that the motions to dismiss and to strike allegations of the complaint be denied. The Court has previously heard and denied a motion to dismiss and motions for summary judgment without prejudice to their renewal after discovery is complete.

As to the interrogatories at issue, Nos. 14, 16(a)-(e), and 17, my recommendations are as follows:

No. 14. Plaintiff filed a supplemental answer to this interrogatory in response to defendants' present motion. The defendant seeks the facts on which plaintiff relies to

support the allegations in Paragraph 5(a), (b) and (c) of the amendment to the complaint. The defendants are entitled to this information. I recommend that plaintiff be ordered to make further answers. Plaintiff's original and supplemental response is almost all conclusion, not facts.

Rule 26(c), Federal Rules of Civil Procedure, provides that discovery may only be had of matter that is "not privileged". Therefore, the discovery rules cannot reach information protected by the privilege against self-incrimination. If information would furnish "a link in the chain", *Hoffman v. U.S.*, 341 U.S. 479, 486, of evidence needed to prosecute for a crime, it cannot be had by discovery in a civil action. It is not necessary that criminal charges be pending against a party for the privilege is available even if the risk of criminal prosecution is remote. The Courts have often held that the privilege against self-incrimination justified a person in refusing to answer or to respond to interrogatories. See: *Bowles v. Trowbridge*, 60 F.Supp. 48 (D.C. Cal. 1945). In this case the plaintiff has made a Fifth Amendment objection in responding to Interrogatories 16(a), 16(b), 16(c), and 16(d), and in part, to 17. In its memorandum in support of its motion to compel answers to those interrogatories the defendants rely only on *Lyons v. Johnson*, 415 F.2d 504 (9th Cir. 1969), in which case the Court of Appeals dismissed the plaintiff's civil complaint when she refused to answer any questions put to her at her deposition. The plaintiff in opposing defendants' motion points out that in *Lyons* the plaintiff refused to submit to any discovery whatsoever in relation to her claims invoking the Fifth Amendment privilege against self-incrimination, but as plaintiff points out, the Court holding was a very narrow one and can clearly be said

to be limited to the unusual facts of that case. *Lyons v. Johnson* does not stand for the proposition that a plaintiff in a civil action cannot assert a Fifth Amendment claim of privilege when presented with interrogatories. The defendants' reliance on *Lyons,* indicates they believe that it precludes plaintiff in this case, as a matter of law, from invoking a Fifth Amendment claim of privilege with respect to the interrogatories involved here. That argument cannot be sustained.

In his amended complaint, the plaintiff states that he was told to stab a black inmate, but refused to do so. Interrogatories 16(a)-(d) seek factual details about these allegations. He has refused to answer, claiming Fifth Amendment privilege and fear of reprisal. Interrogatory 16(a) asks the plaintiff to identify the black inmate, identify each inmate who told him to stab the inmate, to state when and where such statements were made, to state the substance of each conversation and to identify anyone with any knowledge of these statements. This interrogatory seeks information with respect to a potentially criminal act that plaintiff claims he was instructed to carry out, but refused to do so, so that it does not appear that to answer the interrogatory or any of its parts would furnish any evidence of a crime or "a link in the chain" of evidence needed to prosecute for a crime. Interrogatory 16(b) asks the plaintiff to identify anyone with whom he discussed the stabbing, giving the time and place of the discussion and the substance of the conversation. No. 16(c) asks the plaintiff to identify the persons who allegedly told him he would be killed if he refused to carry out the stabbing, and to give the time and place of the conversation and its substance. Interrogatory 16(d) asks the plaintiff to identify

anyone with any information concerning these threats. The situation with respect to 16(b) (c) and (d) is the same as 16(a), that is, for the plaintiff to respond to these interrogatories would seem to furnish no evidence of a crime, nor a link in the chain of evidence of a crime, because plaintiff did not commit the stabbing that he was allegedly asked to perform.

Accordingly, it is my recommendation that the plaintiff's objection to answering Interrogatories 16(a) (b) (c) and (d) insofar as it is based upon a claim of Fifth Amendment privilege against self-incrimination, be denied; and that defendants' motion to compel answers be granted.

As a separate objection to Interrogatories 16(a)-(d), plaintiff asserts that to require an answer would place his life in immediate and grave danger from reprisals from other inmates. Plaintiff argues that defendants' motion should be denied on this ground because plaintiff is entitled to protection under Rule 26(c)(1), F.R.Civ.P., from annoyance, embarrassment, oppression or undue burden. His argument is that oppression and undue burden result from the alleged peril to his life if he is compelled to respond. The defendants' right of discovery, of course, needs to be balanced against plaintiff's claims of burden and oppression in responding to legitimate discovery. Here the support for plaintiff's contention of impending peril if he was forced to answer the interrogatories is supported, if at all, by conclusive argument in his responding papers together with one affidavit of a Folsom State Prison inmate.

It is my recommendation that the plaintiff's objection to responding to Interrogatories 16(a)-(d) on this second ground be denied, and that defendants' motion to compel answers be granted. It is my further recommendation that a protective order be entered, and that the answers to these

interrogatories be sealed and filed with the Court and made available only to the parties to the action and counsel.

No. 16(e). This interrogatory asks plaintiff to identify all sources of his "information and belief" that that knowledge of the threat against him for refusal to carry out the stabbing was transmitted to defendants. Defendants correctly point out that plaintiff's response does not recite facts to show defendants had knowledge of the threat. I recommend that plaintiff make further answer to this interrogatory.

Interrogatory 17 asks the plaintiff to describe in detail the stabbing incident of June 8, 1970, and to identify the person who stabbed him. On the same two grounds as raised with respect to Interrogatories 16(a)-(d), the plaintiff has objected to identifying the person who stabbed him. He has otherwise responded to this interrogatory. For the reason stated above, it is my recommendation that the plaintiff's objection be over-ruled and that the defendants' motion to compel the plaintiff to answer that portion of the interrogatory be granted, and that the response be covered by a protective order as indicated above.

As to those interrogatories where further answers are to be made by plaintiff, I recommend they be filed within 30 days from the date of these Findings and Recommendations.

Dated: March 5, 1973.

/s/ DAVID R. URDAN
David R. Urdan
United States Magistrate

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that copies of the foregoing Findings and Recommendations in Case No. C-70-2423 OJC were this date mailed to the following:

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Dated: March 5, 1973.

/s/ DAVID R. URDAN
David R. Urdan
United States Magistrate

In the Supreme Court of the United States

OCTOBER TERM, 1973

Supreme Court, U. S.
FILED
JAN 31 1974
MICHAEL RODAK, JR., CLERK

No. 73-906

L. N. PATTERSON, et al.,
Petitioners,

vs.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA,
Respondent,

BERNARD C. VUN CANNON,
Real Party in Interest.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners' Reply to Respondent's Brief in Opposition

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TABLE OF AUTHORITIES CITED

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Respondent,

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Real Party in Interest.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioners' Reply to Respondent's Brief in Opposition

PRELIMINARY STATEMENT

In opposing the petition for Writ of Certiorari, Vun Cannon, the real party in interest, asserts in his "Statement" (Brief at 2-3) that his refusal to answer the interrogatories in question was based not only on the privilege against self-incrimination but also on the "ground that since furnishing such answers would place his life in immediate and grave danger of reprisals from other inmates, the

court should afford protection from undue burden under Rule 26(c)." Vun Cannon then further asserts that the district court did not reach the Rule 26 claim because the court agreed that the privilege was applicable. While this is accurate, it is incomplete. In connection with Interrogatory No. 17 which Vun Cannon refused to answer on the same two grounds, the Court concluded that there was no danger of self-incrimination and ordered him to answer the question. The Court then determined the Rule 26 claim, and issued a protective order sealing the answer. *See* Appendix to Petition at 5. It seems apparent that the same ruling would apply to the interrogatories at issue here.

Vun Cannon then makes two arguments in opposition to the petition:

1) That under the circumstances of this case, mandamus was not a proper remedy in the Court of Appeal (Brief at 3); and 2) that where a plaintiff refuses to answer interrogatories seeking information which is privileged under Rule 26, a trial court has no authority to dismiss the complaint or to impose other sanctions for such refusal (Brief at 8). We respond briefly to each argument.

ARGUMENT

I

Mandamus Is a Proper Remedy

The real party in interest quotes this Court in *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964) for the proposition that the writ is not to be used as a substitute for appeal even though hardship may result, but is appropriately issued when there is usurpation of judicial power or a clear abuse of discretion (Brief at 4). It is petitioners' contention that such a clear abuse of discretion exists in this case: the district court erroneously permitted the assertion of the privi-

lege against self-incrimination, an interpretation of "privilege" which, we assert, is totally erroneous.

In an effort to demonstrate that there has been no prejudical impact as to petitioners, Vun Cannon states that petitioners did not raise in the lower courts and have asserted for the first time in this petition that they have been denied access to facts which are "basic to the cause of action" or "on which his cause of action is based." (Brief at 4-5; 5 n. 1.) Thus, he urges that it is inappropriate for this Court to consider the issue.

Vun Cannon is mistaken. The precise issue raised in the petition was raised in both the district court and the Court of Appeal. In the district court, petitioners stated: "Plaintiff's allegation that he was threatened that the defendants knew it and deliberately set up plaintiff so the known would be killers would have access to him is the entire gravamen of his complaint." (Motion to Compel Answers or in the Alternative to Dismiss the Complaint and Motion to Strike Allegations of the Complaint, filed December 20, 1972, at p. 5); "The questions plaintiff has refused to answer concern allegations central and basic to his claim." *Id.* at 7. In the Court of Appeal, petitioners stated: "Plaintiff's allegation that he was threatened, that the defendants knew it and deliberately set up plaintiff so the known would be killer would have access to him is the entire gravamen of his complaint." (Petition for Writ of Mandamus and/or Prohibition, filed on July 24, 1973, at p. 4); "The allegations of the complaint to which the interrogatories relate are basic to the cause of action" *Id.* at 8. Thus, we cannot conceive of the basis for Vun Cannon's assertion that the issue was not raised.

Vun Cannon then makes the further assertion that the contention that these allegations are "basic" to his cause of action is untrue (Brief at 5). We invite this Court's atten-

tion to Vun Cannon's Brief in this Court at page 2, where he states that petitioners have argued that under *Williams v. Field,* 416 F.2d 483 (9th Cir. 1969) liability is precluded unless Vun Cannon is able to show a bad faith motive or intentional misconduct. In his complaint, this "bad faith motive" was alleged to include summary punishment of Vun Cannon because of "his refusal to attack a black inmate." *See* Appendix to Petition at 13.

Vun Cannon's additional arguments that the harm to petitioners is minimal because they can get the information from other sources (Brief at 6) and that a ruling in petitioners favor would not determine the issue of Vun Cannon's liability to answer the questions because of the court's failure to rule on his second ground are unpersuasive. As to the first, the harm to petitioners cannot be assessed, but it is obvious that plaintiff is the only one who can really respond to the issue of whether he was threatened and who threatened him. As to the second, the court ruled on the second ground in connection with Interrogatory No. 17, as pointed out in the preliminary Statement, *supra.*

Finally, Vun Cannon urges that the District Court's ruling is not "either fundamental in nature or wide-ranging in scope." (Brief at 7.) We disagree. The question raised by the petition as to the interpretation of "privilege" under the federal rules of discovery is one of first impression in this Court; one which has resulted in conflicting opinions in the federal courts,[1] and one on which standard texts take opposite positions.[2] Such a case is an appropriate one for review

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1. *Compare Lyons v. Johnson,* 415 F.2d 540 (9th Cir. 1969) *cert. denied,* 397 U.S. 1027 and *Brown v. Ames,* 346 F.Supp. 1176 (D. Minn. 1972) *with Alioto v. Holtzman,* 320 F.Supp. 256 (E.D. Wisc. 1970).

2. *Compare* 4 Moore's Federal Practice ¶ 26.60 [6] (Second Edition 1972) *with* 8 Wright & Miller, Federal Practice and Procedure § 2018 (1970).

by mandate and by this Court. *Cf. Schlagenhauf v. Holder, supra,* at 110-111.

II

The Question at Issue Is Not Whether Sanctions Can Be Imposed for Properly Invoking a Privilege But Whether the Court Properly Permitted Assertion of the Privilege.

Vun Cannon states that petitioners have "conceded" that discovery cannot reach information protected by the privilege against self-incrimination, that Vun Cannon properly invoked the privilege and that Rule 37 does not authorize sanctions against a party who refuses discovery with respect to privileged information (Brief at 8). Vun Cannon has overlooked the entire thrust of petitioners' argument: The information requested is *not* privileged because any privilege which might have existed has been waived.

In making the allegations at issue here, Vun Cannon has put himself in the same position as a criminal defendant who testifies. Once he does so, he waives his privilege and cannot thereafter assert it to prevent cross-examination. This Court has stated that "privilege" is to be interpreted as it is in the rules of evidence governing trials. *See U.S. v. Reynolds,* 345 U.S. 1, 6 (1953). A party who testifies is subject to cross-examination. By simple analogy, a party who makes allegations can be questioned concerning them.

Vun Cannon relies on the views expressed in 8 Wright and Miller § 2018, (*See* Brief at 9), that it is "inconceivable that by exercising his constitutional right to bring or defend an action a person waives his constitutional right not to be a witness against himself." We suggest that the authors' argument for this proposition, if applied to allegations of the complaint, is unsupported by logic and based on faulty analogies. Moreover the result reached is both totally incon-

sistent with the policy underlying discovery and egregiously unfair.[3]

Finally, Vun Cannon asserts that petitioners are seeking mandamus to compel the court to "depart from well settled principles of constitutional law in favor of a novel theory." What petitioners are seeking is their right to "cross-examine" the plaintiff as to assertions made in a complaint against which they must defend themselves. Vun Cannon is attempting to achieve a benefit for himself by bringing the action and making the allegations. Simple fairness requires that he must be held to his waiver, or forego the allegations or action as appropriate.

CONCLUSION

Because this is such an important and unresolved question in the interpretation of the federal rules, and because of its impact on the ever increasing number of prisoners civil rights actions, we respectfully urge that the petition for Writ of Certiorari be granted.

Dated: January 30, 1974

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3. Vun Cannon also cites this Court's opinion in *Schlagenhauf v. Holder, supra.* (*See* Brief at 9-10; n. 5.) This Court was interpreting Rule 35, and did not reach the waiver question raised in this case.